

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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74-1714

To be argued by
ALBERT S. DABROWSKI

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 74-1714

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCISCO ARTIERI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

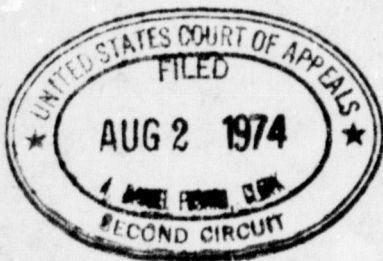
BRIEF FOR THE APPELLEE

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FRANCISCO ARTIERI,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

The appellant Francisco Artieri and five others (Edward Arnott, Crawford Couch, Ismael Estrada, Efrain Garcia and Graciano Gonzales) were indicted on April 13, 1973 by a Federal Grand Jury sitting at Hartford, Connecticut. The defendants were charged with possession of 69 grams of heroin with intent to distribute and with distributing .16 grams of heroin both in violation of Title 21, United States Code, Section 841(a)(1). The defendants were also charged with conspiracy to distribute, and possession with intent to distribute heroin in violation of Title 21, United States Code, Section 846.

The appellant entered a plea of not guilty to each of the three counts on May 7, 1973. The five other defendants all pleaded guilty on or before December 19, 1973.

Trial by jury commenced on December 19, 1973 before the Honorable M. Joseph Blumenfeld, United States Dis-

trict Judge. During the two day trial a Federal narcotics agent testified that he had received the heroin from co-defendant Estrada on February 22, 1973. Estrada himself testified that he had participated in the sale of the heroin by the appellant to the agent because the appellant had promised him 12 bags of heroin. The jury deliberated for less than one hour and returned a verdict of guilty on all counts.

On May 10, 1974 the appellant was sentenced to the custody of the Attorney General for a period of three years to be followed by a special parole period of five years pursuant to the provisions of Title 21, United States Code, Section 841(b)(1)(A) on each of the three counts, to run concurrently. The defendant's original bond of \$5,000 was continued pending this appeal.

Statutes Involved

Title 21, United States Code, Section 841(a)(1):

§ 841. *Prohibited acts A—Unlawful acts*

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

Title 21, United States Code, Section 846:

§ 846. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub. L. 91—513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.

Questions Presented

1. Were the extra-judicial declarations of the co-conspirators admissible against the defendant—appellant?
2. Was the evidence sufficient to sustain a verdict of guilty on each of the three counts?

Statement of Facts

On February 21, 1973, Wayne Drew, a Special Agent with the Drug Enforcement Administration, operating in an undercover capacity, met with co-defendant Edward Arnott outside of Lindy's restaurant in Willimantic, Connecticut (Tr. p. 11).^{*} Agent Drew had purchased heroin from Arnott on previous occasions (Tr. p. 12-13). After an unsuccessful attempt to locate the defendant Artieri at a local grocery store the two men returned to Lindy's restaurant where they were joined by co-defendants Efrain Garcia and Ismael Estrada. About ten minutes after his arrival at Lindy's restaurant Agent Drew observed Artieri walk by his table, look at both Arnott and himself, and the proceed to the bar section of the restaurant which was out of sight of the agent (Tr. p. 16, 44).

While seated at the table with Garcia, Estrada and Arnott, Agent Drew was asked if he was interested in purchasing three ounces of heroin for \$4,000 (Tr. p. 17). After Drew indicated he would pay \$3,500 Estrada stated he had to talk to "the man" and proceeded into the bar area out of sight of the agent (Tr. p. 18). Estrada returned and the negotiations continued. After Estrada left the table a second time to see "the man" Agent Drew agreed to purchase the three ounces of heroin for \$4,000. Estrada

^{*} References marked (Tr. p.) refer to trial transcript.

testified that while in the bar section he met with Artieri and discussed the deal (Tr. p. 91). Estrada testified that the heroin belonged to Artieri and that he had become involved in the deal because Artieri had promised him 12 bags of heroin for his own use (Tr. p. 97-98).

Arrangements were made to complete the sale at the Frontenac restaurant in Willimantic that same evening at 7:30 p.m. However, when Agent Drew arrived at the Frontenac at 7:40 p.m. he found no one there (Tr. p. 19). Upon returning to Lindy's restaurant about an hour later Drew was told by Garcia and Estrada that they had not seen his car at the Frontenac (Tr. p. 20). After attempts to proceed with the sale that evening failed, arrangements were made to meet at the Frontenac restaurant at one p.m. on the following day (Tr. p. 20).

The following day at approximately 1:20 p.m. Drew met with Garcia and Crawford Couch at the Frontenac restaurant. Drew was advised that the heroin would not be available until approximately 5:00 p.m. After Drew indicated that the heroin would have to be available sooner or the sale would not go through Couch stated that he would attempt to locate the man and would be back at the Frontenac within an hour or an hour and a half (Tr. p. 21).

Approximately an hour later, at 2:30 p.m., Agent Drew, Garcia and Couch met again at the Frontenac (Tr. p. 22). At 3:00 p.m. Estrada arrived and told Agent Drew that he had just met the man, who he referred to as "Peba," who was arranging for the delivery of the heroin and he was now awaiting that delivery (Tr. p. 23). Estrada and Couch testified that "Peba" was the defendant Francisco Artieri (Tr. p. 88, 127).

At 3:15 p.m. the appellant Artieri arrived at the Frontenac and proceeded to a seat at the end of the bar away from the table where Agent Drew, Couch, Garcia and Estrada were seated (Tr. p. 25). Estrada approached Artieri and after a brief conversation returned to the table and stated that the heroin would be there in approximately twenty (20) minutes (Tr. p. 25).

At approximately 3:25 p.m. Graciano Gonzales came to the front of the restaurant and was identified by the individuals seated with Agent Drew as the man who was bringing the heroin (Tr. p. 27). Artieri, accompanied by Estrada, had a conversation of less than five (5) minutes with Gonzales in view of Agent Drew who remained inside the restaurant with Couch and Garcia (Tr. p. 27). Gonzales then departed the area and Artieri returned to his seat at the end of the bar (Tr. p. 27-28). Estrada returned to the table and stated that there was going to be another delay (Tr. p. 28).

Estrada, Garcia and Couch then explained to Agent Drew that when Gonzales returned Estrada would meet him in the men's room and provide him with a sample of the heroin for testing. Drew was to enter the men's room when he saw Gonzales leave (Tr. p. 28-29).

Approximately one hour later Gonzales entered the Frontenac and had a brief conversation with Artieri who was still at the end of the bar (Tr. p. 30-31). Estrada, followed by Gonzales, then entered the men's room (Tr. p. 30-31). Upon Gonzales' departure from the men's room Agent Drew was told by Couch that it was time for him to go in the men's room (Tr. p. 31). Inside the men's room Drew received a sample of the heroin for testing from Estrada (Tr. p. 31). Then, as had been previously agreed, Drew proceeded to his car where undercover Agent John Albano was to test the heroin. As he departed the restaurant Agent Drew noticed Gonzales talking to Artieri

at the end of the bar (Tr. p. 32). After a field test proved positive the defendants were placed under arrest. Agent Albano recovered the package of heroin from a chair at the table where Agent Drew, Couch, Garcia and Estrada had been seated (Tr. pp. 34, 36).

ARGUMENT

I.

The extra-judicial declarations of co-conspirators were admissible against the defendant-appellant because there was proof *aliunde* of the conspiracy.

The declarations and acts of a co-conspirator made in furtherance of the conspiracy and during its pendency are admissible against his partner in crime on the theory that each conspirator is the agent of the others. *United States v. Alsondo*, 486 F.2d 1339, 1347 (2d Cir. 1973). *United States v. Granello*, 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967); *United States v. Mishkin*, 317 F.2d 634, 637 (2d Cir.), *cert. denied*, 375 U.S. 827 (1963); *United States v. Lev*, 276 F.2d 605 (2d Cir.), *cert. denied*, 363 U.S. 812 (1960). However, such evidence is admissible only if the defendant's participation in the venture is shown by independent evidence, or proof *aliunde*. *United States v. Calarco*, 424 F.2d 657, 660 (2d Cir. 1970); *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *United States v. Stadter*, 336 F.2d 326 (2d Cir.), *cert. denied*, 380 U.S. 945 (1964).

The order of proof is a matter within the sound discretion of the trial judge. *United States v. Cassino*, 467 F.2d 610, 616 (2d Cir. 1972); *United States v. Sansone*, 231 F.2d 887, 893 (2d Cir.), *cert. denied*, 351 U.S. 987

(1956). If the evidence is admitted "subject to connection" the prosecution must ultimately prove "participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances." *United States v. Geaney*, *supra* at 1120.

As Judge Waterman pointed out in *United States v. Ragland*, 375 F.2d 471 (2d Cir. 1967), "the independent evidence need not, as appellant suggests, be so clear and convincing as to *compel*, absent contradiction, a finding of fact sought to be proved." *Id.* at 477. See *Geaney*, *supra* at 1119.

In the case at bar the conspirators, excluding Artieri and Gonzales, met with the undercover agent on a number of occasions both at Lindy's restaurant and at the Frontenac restaurant during a two-day period. Artieri was present at both restaurants on most of these occasions. Moreover, at almost every critical juncture of the conspiracy Artieri met with one or more of the co-conspirators.

On February 21, 1973 at Lindy's restaurant Artieri looked at both co-conspirator Arnott and undercover Agent Drew prior to entering the bar section of the restaurant. Of critical importance is the testimony of co-conspirator Estrada who testified that while in the bar he discussed with Artieri the deal "to sell some heroin," that it was Artieri's (Peba's) heroin and that he had been promised 12 bags of heroin by Artieri if he would participate in the deal (Tr. p. 91, 97-98). On February 22, 1973, at the Frontenac, Artieri spoke with co-conspirators Estrada and Gonzales on several occasions during critical junctures of the conspiracy including conversations with Gonzales immediately prior to and following the transaction in the men's room.

The government submits that the testimony of Estrada clearly permits the inference that Artieri not only participated but played a key role in directing the activity involved in this conspiracy. When Estrada's testimony is considered with the rest of the evidence, excluding the extra-judicial declarations of the appellant's alleged co-conspirators, there is ample independent evidence that the appellant associated himself with this venture. *United States v. Calabro*, 449 F.2d 885 (2d Cir. 1971).

II.

The evidence was sufficient to sustain a verdict of guilty on each of the three counts.

When viewing the evidence in the light most favorable to the government it is clear that the proof at trial supports the defendant's conviction. *United States v. Sisca* (Slip Op., 2d Cir., May 10, 1974, at 3422); *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972).

As previously stated, since Artieri's participation in the venture was established by independent evidence, the hearsay declarations of co-conspirators were properly received in evidence. Therefore, the Court had before it not only the evidence of Artieri's actions during the conspiracy and the testimony of co-conspirator's Estrada and Couch, but there was also Estrada's extra-judicial statement that it was "Peba," who Estrada identified as Artieri, who was the man arranging the delivery of the heroin (Tr. pp. 23, 88).

While evidence of mere presence at a meeting, without additional facts, is not sufficient to support an inference of participation in a conspiracy, *United States v. Stewart*, 451 F.2d 1203 (2d Cir. 1971); *United States v. Kearse*, 444 F.2d 62 (2d Cir. 1971), the prosecution does not have to show that the defendant personally received the pay-

ment or hand-delivered the heroin. *United States v. Morris*, 269 F.2d 100, 102 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959); *United States v. Rossi*, 219 F.2d 612, 614 (2d Cir.), *cert. denied*, 349 U.S. 938 (1955). The testimony of Estrada and his extra-judicial statement coupled with the other evidence permitted the jury to find that Artieri "arranged and directed" the sale even though he attempted to remain physically detached from the actual transaction. *United States v. Sisca*, *supra* at 3423-24; *United States v. Morris*, *supra* at 102.

The appellant's claim that "reasonable men could not possibly have believed (Estrada) beyond a reasonable doubt" is without merit (Brief for Appellant at p. 5). The fact that Estrada was a co-conspirator with a criminal record who may have believed he would personally benefit by testifying against Artieri does not disqualify him as a witness but only affects the weight of his testimony which is "a matter for consideration by the jury and not by this court." *United States v. Rainone*, 192 F.2d 860 (2d Cir. 1951). See *Burge v. United States*, 332 F.2d 171, 174 (8th Cir. 1964); *United States v. Rosenberg*, 195 F.2d 583, 592 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

CONCLUSION

The United States, for the reasons submitted, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-1714

UNITED STATES OF AMERICA

Appellee

v.

Francisco Artieri

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave
Brooklyn, N.Y.

That on the 2nd day of August, 1974, deponent served the within Brief for the Appellee
upon Philip M. Finkelstein, Esq.
36 Russ Street.,
Hartford, Connecticut 06106

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

This 2nd day of August 1974

William A. McKaigney
WILLIAM A. MCKAIGNEY
Notary Public, State of New York
No. 41-7846700
Qualified in Queens County
Certificate filed in Kings County
Commission Expires March 30, 1976